

Supreme Court, U. S.
FILED

DEC 15 1976

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1976

No. 76-818

R. D. FITCH, ET AL,

Appellants,

vs.

HIJINIO SILVA, ET AL,

Appellees.

**APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT
OF TEXAS**

JURISDICTIONAL STATEMENT

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TABLE OF CONTENTS

	Page
OPINION BELOW	2
GROUND OF JURISDICTION OF SUPREME COURT	2
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	3
FEDERAL QUESTION IS SUBSTANTIAL	5
CONCLUSION	10
PROOF OF SERVICE	11
 APPENDICES:	
A. JUDGMENT OF THE U.S. DISTRICT COURT DATED OCTOBER 5, 1976 (SINGLE JUDGE)	12
B. ORDER AND FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE U.S. DISTRICT COURT DATED OCTOBER 4, 1976 (SINGLE JUDGE)	14
C. ORDER AND FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE U.S. DISTRICT COURT DATED SEPTEMBER 26, 1976 (THREE JUDGE)	17
D. ORDER VACATING JUDGMENT OF THE U.S. DISTRICT COURT DATED AUGUST 5, 1976 (THREE JUDGE)	20
E. ORDER ["CONSENT" ORDER] OF THE U.S. DISTRICT COURT DATED JUNE 28, 1976 (THREE JUDGE)	22
F. NOTICE OF APPEAL	28
SPECIAL APPENDIX — PAGE REFERENCES TO SEPTEMBER 2, 1976 HEARING TRANSCRIPT	31

INDEX OF AUTHORITIES

In Re Railroad Co. of New Jersey, 136 F.2d 633	6
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IN THE
Supreme Court Of The United States

OCTOBER TERM, 1976

No.

R. D. FITCH, Individully and in His
Official Capacity as Frio County,
Texas, County Judge; WILLIAM A. BOYD,
JAMES C. STACY, and OWEN LESTER,
Individually and in Their
Official Capacities as County Commissioners
of Frio County, Texas; MONA HOYLE,
Individually and in Her Official Capacity as
Frio County, Texas, County Clerk;
BENNY C. SANDERS, Individually and in
His Official Capacity as Sheriff of
Frio County, Texas; YANCEY BARNHART,
Individually and in His Official Capacity as
Democratic Party Chairman of Frio County,
Texas; and FRIO COUNTY, TEXAS,

Appellants,

vs.

HIJINIO SILVA, CARMELINA TREVINO,
ARNALDO HERNANDEZ, MODESTA SALAZAR,
ANITA GARZA, NOEL PEREZ and
RUDY GONZALES,

Appellees.

**APPEAL FROM THE UNITED STATES
FOR THE WESTERN DISTRICT OF TEXAS
DISTRICT COURT**

JURISDICTIONAL STATEMENT

Pursuant to Rules 13(2) and 15 of the Rules of
the Supreme Court of the United States, appellants,
R. D. Fitch, William A. Boyd, James C. Stacy, Owen
Lester, Mona Hoyle, Benny C. Sanders, Yancey Barn-
hart, and Frio County, Texas, file this statement of

the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review the Judgement and Orders entered by the three judge court of the United States District Court for the Western District of Texas in this case and should exercise such jurisdiction herein.

OPINION BELOW

No opinion has been either filed or published by the Court in this case up to this time.

GROUND OF JURISDICTION OF SUPREME COURT

This appeal arises from an action to enjoin appellants, as defendants, from holding elections under an apportionment plan alleged to be in violation of the Voting Rights Act of 1965, as amended, which turned into a reapportionment proceeding by virtue of the entry of a "consent" order of reapportionment without the actual consent of the defendants and without a trial of any kind on the issue of reapportionment. The judgment of the United States District Court was entered on October 5, 1976. A timely notice of appeal was filed on October 22, 1976, in the United States District Court for the Western District of Texas. The jurisdiction of this Court is invoked under the specific provisions of Title 42, United States Code, Section 1973c, last sentence.

QUESTION PRESENTED

Whether the court below properly reinstated a so-called consent order of reapportionment after having vacated same by order dated August 5, 1976 under Rule 60b, F.R.C.P. for lack of consent by defendants, and in finding that such order was entered into vol-

untarily, thereby denying defendants a trial of any kind on the merits? This is a due process case.

STATEMENT OF THE CASE

The facts of the case underlying this appeal are as follows: The Commissioners' Court of Frio County adopted a reapportionment plan on August 16, 1973, (some two years before Texas came under the Voting Rights Act). This plan was not precleared by the Justice Department pursuant to Section 5 of the act. On April 22, 1976, prior to the Texas primary elections scheduled for May 1, 1976, appellees, as plaintiffs, brought suit for temporary injunctive relief to block the holding of such primary election as to precinct offices, which relief was granted.

The suit was not only brought against the county, the county judge, and the four county commissioners, but also against the sheriff, the court clerk, and the county chairman of both the Democratic and Raza Unida parties.

While the suit was pending untried, and before any kind of hearing had been held before the court of three judges which had been convened, the special attorney for the county and the Commissioners' Court entered into an "agreed settlement" with the attorneys for the plaintiffs (as of May 31, 1976) which was signed as an order and final judgment by the three judges on July 6, 1976 nunc pro tunc June 28, 1976.

The plan incorporated in such order had been approved by a three to two vote of the Commissioners' Court on May 27, 1976. Commissioner Stacy voted against the plan and Commissioner Lester abstained. These two defendants individually never agreed to the "consent" order. The defendants Hoyle (County

Clerk), Sanders (Sheriff) and Barnhart (Democratic County Chairman) have never to this day agreed to it nor were they offered a chance to assent or object thereto by the said special attorney for the county (Craig L. Austin). Two of these defendants, Sanders and Barnhart, were not even present at the May 27th meeting at which the settlement was made. Attorney Austin was not employed to represent any of these last named three defendants, as shown by the minutes of the Commissioners' Court. Nor did he represent Gonzales, the Raza Unida Chairman, who was totally inactive herein ("he defaulted" as Attorney Austin himself testified) until he and Commissioner Perez appeared at the only three judge court hearing in this case held at Austin, Texas on September 2, 1976. Gonzales and Perez then appeared with personal attorneys and had themselves realigned as plaintiffs. Their only "contribution" to the trial was to get a judgment for their attorney fees.

Meanwhile, on July 6, 1976 the Commissioners' Court of Frio County unanimously voted to discharge Mr. Austin as their attorney and to employ their present counsel to file a motion seeking to vacate the "consent" order of July 6, 1976 nunc pro tunc June 28, 1976.

Such a motion, supported by fourteen affidavits, was filed on July 14, 1976 and on August 5, 1976 the three judge court, without hearing, entered its order vacating said "consent" order under Rule 60b, F.R.C.P.

Plaintiffs sought and obtained (after a hearing on August 13, 1976) from the single judge a continuation of the temporary injunction pending a hearing before the three judge court. Such three judge hearing was held on September 2nd as set out above.

At said hearing of September 2, 1976 defendants County Judge Fitch and Commissioner Boyd testified that the only reason they had voted for the settlement plan was because their then attorney represented to them that if they did not do so the county could not be reapportioned under any circumstances until after the federal census of 1980 (which is admittedly not legally true). Such testimony was verified by the testimony of the defendants Stacy, Lester and Hoyle and even the Attorney Austin testified that these defendants "could have drawn (such) conclusion from my advice, and probably did draw (such) conclusion . . ."

The evidence adduced at said hearing also reflects that the former attorney for the county materially misrepresented the case of *Beer v. U.S.*, (47 L.Ed.2d 629; 96 S.Ct. 1357) to his clients. Further, the uncontradicted testimony of Tax Assessor Collector Nations showed that the rejected reapportionment plan of 1973 provided a clear majority of registered voters of Mexican ancestry in three out of the four Commissioners' precincts of the county. The 1970 census showed the Mexican American population of the county to be less than 70%.

The **only** evidence controverting any of these facts came from the testimony of the former special attorney for the defendants, Craig L. Austin, and his testimony actually corroborates most of such facts when his equivocations and self-serving conclusions are taken into account.

FEDERAL QUESTION IS SUBSTANTIAL

This appeal presents a federal question which is **not** only substantial but fundamental in that what is involved is the constitutional right to due process of law.

We think it goes without saying that a final judgment entered against a number of defendants without a trial on the merits (and without default on their part) in the guise of a consent decree when in fact one or more of such defendants have not actually consented thereto is as plain (and serious) a violation of constitutional law as could be imagined.

In the case of *In Re Railroad Co. of New Jersey*, 136 F.2d 633, the Third Circuit enunciated the fundamental principle spoken of above:

"The right to notice and a hearing is one of ancient origin and by the due process clauses of the 5th and 14th amendments has been safeguarded to all against deprivation by the federal government and the states, respectively. The fact that the state had notice and appeared is not sufficient to satisfy the requirement of due process. It must also have been afforded an opportunity to be heard . . ."

The Court cited the 1665 English case of the Protector and the Town of Colchester, 82 Eng. Repr. 850 by Chief Justice Roll. See footnote, page 639.

That there has been no hearing in this case on the merits of the reapportionment of Frio County, either as to the 1973 plan or as to the plan contained in the so-called agreed order, or as to any other plan, is beyond dispute.

The only question left for decision is as to whether or not every defendant in this case consented to the agreed order of June 28, 1976 incorporating the reapportionment scheme now in effect.

It is beyond dispute that none of the defendants signed said order or that any of them directly assented thereto. The only attorney signing said order (oth-

er than plaintiff's attorney) was Craig L. Austin, the attorney employed by the Commissioners' Court to represent Frio County. Mr. Austin, in signing said order, clearly did not do so as the attorney for the defendants Hoyle, Sanders and Barnhart and the then defendant Gonzales. Nor for Commissioners Stacy and Lester as individuals and individual Commissioners, for they did not vote for the plan incorporated in the order.

The evidence further shows that Commissioner Perez (now realigned as a plaintiff) had told Attorney Austin that he did not represent him, and further, that Austin had told defendant Hoyle that he didn't represent her.

Finally, the defendants County Judge Fitch and Commissioner Boyd did vote for the plan (with Perez) but as they have shown in their several affidavits, and in giving testimony *viva voce* at the only three judge court hearing of September 2, 1976, they did so only because of representations made by their attorney that if they did not agree thereto that the County could not be reapportioned until sometime after the completion of the 1980 decennial census and that they could not win the case in any event because of the holding of this Court in the *Beer* case, which decision he misrepresented to them as conclusively proven by his letter of June 7, 1976 to Editor Reddell. To counter this the plaintiffs have contended that all of the parties except the county and the members of the Commissioners' Court were nominal parties. These other defendants, however, were not sued as nominal parties (all are on the County Election Board by law) and a review of the agreed order of June 28, 1976 will reveal that all of them were fully bound thereby as de-

fendants, individually as well as collectively.

The single judge court has sought to support the reinstitution of the "consent" order by adjudging the attorney fees solely against the defendant county. See order of October 4, 1976 and judgment of October 5, 1976. The individual defendants remain liable for court costs and to citation for contempt in the event the judgment is violated, regardless of by whom.

It is important to bear in mind that the three judge court vacated the agreed judgment or "consent" order by its order of August 5, 1976, filed August 9, 1976, reciting that it was "... not agreed to by many of the defendants and is therefore void ..."

The recited fact remains true today. It was based on fourteen affidavits which have not been controverted. The court abused its discretion and denied many (if not all) of the defendants of their basic constitutional right to due process of law by reversing its decision on the basis of the evidence at the September 2nd hearing.

In its new order the three judge court found (Finding of Fact No. 2, order of September 26, 1976) that

"The Agreed Settlement ... was entered into by the defendants (meaning **all** of them) voluntarily and not as a result of fraud or compulsion."

This finding is baseless because there has never been any claim on the part of the defendants Hoyle, Sanders, Barnhart, Stacy and Lester that they were forced or defrauded into agreement. The simple fact is that they claim (and the record completely supports them) that they never agreed to it all.

We attach hereto for the convenience of the Court

in a special appendix a list of references to the transcript of testimony of the September 2nd hearing before the three judge court which we believe particularly substantiates appellants' contentions. This transcript has been designated as part of the record.

Attorney Austin did not represent the first three defendants named above and none of these five were asked by him for authority to agree to it in their behalf, nor did they authorize him to agree to this settlement. The last two named defendants either voted against the settlement or refused to vote for it as a matter of uncontroverted official public record (Minutes of the Commissioners' Court meeting of May 27, 1976).

Only two of the present defendants, Fitch and Boyd, actually agreed to the consent order and claim (in effect) that they felt compelled or defrauded into doing so. Therefore, only two out of the original nine individual defendants (of whom seven are still bound by final judgment as individual defendants) assented to it on any basis.

An anomaly of the court's action is that Commissioner Perez, an indispensable party defendant as a member of the Commissioners' Court (if any individual is) has been permitted to become a plaintiff against the County and Commissioners' Court he is supposed to serve and the judgment now does not bind him even as a member of the court!

We can think of nothing as substantial under federal law as assuring to every American the two basic elements of due process, notice and hearing before judgment. The actual judgment here is the so-called "consent" order and its entry was without the actual consent of many defendants. That there was

no hearing on the merits is undisputed.

To countenance such a denial of fundamental constitutional right for the sake of expediency or to exemplify a zeal for civil rights would be nothing less than abhorrent.

The oppressive possibilities of the so-called "agreed judgment" as a device for adjudicating conceived concepts of punitive "affirmative action" without the embarrassment of actual trial of the issues is tremendous.

To brush off such a constitutional threat by referring to parties as "nominal" and by circumscribing their liability to that on the main issue merely aggravates the danger by introducing insidious rationalizations into a practice which is totally wrong at the bedrock of Anglo American constitutional law.

CONCLUSION

For the reasons stated above, appellants submit that this appeal brings before the court substantial and important federal questions which require plenary consideration, with briefs on the merits and oral argument, for their resolution, and that the court should take jurisdiction of this appeal.

Dated December, 13, 1976.

Respectfully submitted,

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Attorney For Appellants

Of Counsel:
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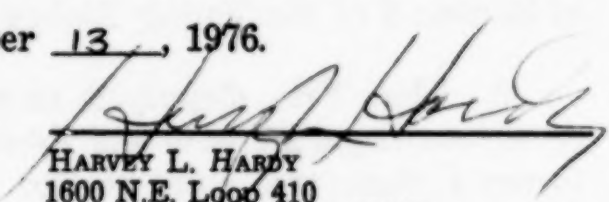
PROOF OF SERVICE

I, Harvey L. Hardy, a member of the Bar of the Supreme Court of the United States and counsel of record for R. D. Fitch, William A. Boyd, James C. Stacy, Owen Lester, Mona Hoyle, Benny C. Sanders, Yancey Barnhart, and Frio County, Texas, appellants herein, hereby certify that on December , 1976 pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing Jurisdictional Statement on each of the parties herein as follows:

On Hijinio Silva, Carmelina Trevino, Arnaldo Hernandez, Modesta Salazar, Anita Garza, Rudy Gonzales, and Noel Perez, appellees herein, by depositing such copies in the United States Post Office, San Antonio, Texas, with first class postage prepaid, properly addressed to the post office address of Mr. Albert H. Kauffman, the above named Hijino Silva, Carmelina Trevino, Arnaldo Hernandez, Modesta Salazar and Anita Garza's counsel of record at 501 Petroleum Commerce Building, 201 N. St. Mary's Street, San Antonio, Texas 78205, and to Mr. Luis M. Segura, the above named Noel Perez's counsel of record, at 523 South Main, San Antonio, Texas, and to Mr. George J. Korbel, the above named Rudy Gonzales' counsel of record, at Apt. 1801, 7200 S. Presa, San Antonio, Texas.

All parties required to be served have been served.

Dated December 13, 1976.


HARVEY L. HARDY
1600 N.E. Loop 410
San Antonio, Texas 78209

APPENDIX A

JUDGMENT OF THE U.S. DISTRICT COURT
DATED OCTOBER 5, 1976 (SINGLE JUDGE)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

HIJINIO SILVA, ET AL

V.

R. D. FITCH, ET AL

SA-76-CA-126

JUDGMENT

This action came on for consideration before the Court, and for the reasons set forth in the Order of the Three-Judge Court dated September 26, 1976, and the Order of this Court dated October 4, 1976,

It is hereby ORDERED, ADJUDGED and DECREED:

1. That the defendants, their agents, employees, successors in office, and all persons acting in concert or in participation with any of them be permanently enjoined from implementing any change in election precincts in Frio County, Texas, unless and until such redistricting is precleared according to the provisions of Section 5 of the Voting Rights Act of 1965;

2. That Frio County is to pay to the Mexican American Legal Defense and Education Fund for attorney's fees the sum of Six Thousand Dollars (\$6,000.00) as agreed in the May 31, 1976, settlement;

3. That Frio County is to pay to the Mexican American Legal Defense and Education Fund for attorney's fees the sum of Thirteen Thousand Seven Hundred Seventy-five Dollars (\$13,775.00) to reimburse it for the services of Joaquin C. Avila and Albert A. Kauffman from July 6, 1976, through October 1, 1976;

4. That Frio County is to pay Noel Perez for attorney's fees the sum of One Thousand One Hundred Fifty Dollars (1,150.00) to reimburse him for the services of Luis Segura from July 6, 1976, through October 1, 1976;

5. That Frio County is to pay Rudy Gonzales for attorney's fees the sum of Two Thousand Twenty-five Dollars (\$2,025.00) to reimburse him for the services of George Korbel from July 6, 1976, through October 1, 1976.

SIGNED this 5th day of October, 1976.

S/DARWIN W. SUTTLE
United States District Judge

APPENDIX B

ORDER AND FINDINGS OF FACT AND
CONCLUSIONS OF LAW OF THE U.S.

DISTRICT COURT

DATED OCTOBER 4, 1976 (SINGLE JUDGE)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

HIJINIO SILVA, ET AL

V.

R. D. FITCH, ET AL

SA-76-CA-126

ORDER

On October 1, 1976, came on to be heard Plaintiffs' Motions asking the Court to award attorney's fees for their successful prosecution of this action. The Court, on the basis of stipulated facts, the evidence presented at a hearing before a Three Judge Court on September 2, 1976, and the evidence presented on October 1, 1976, enters the following findings of fact and conclusions of law:

Findings of Fact:

1. The August 16, 1973, Redistricting Plan (1973 Plan) changing the precinct voting boundaries in Frio County, Texas, was neither precleared by the Department of Justice nor precleared by a declaratory judgment of the District Court of the District of Columbia.

2. The Agreed Settlement of May 31, 1976, (1976 Plan) (entered by the Court *nunc pro tunc* June 28,

1976) changing the precinct voting boundaries in Frio County, Texas, was entered into by the Defendants voluntarily and not as the result of fraud or compulsion.

3. The 1976 Plan was precleared by the Department of Justice on August 24, 1976.

4. To conduct the September 4, 1976, election scheduled under the terms of the 1976 agreement, the parties have printed ballots, acquired polling places and made arrangements for the presence of election officials.

5. The Agreed Settlement of May 31, 1976, provided for attorney's fees of \$6,000.00 payable to MALDEF.

6. On July 6, 1976, the Defendants moved the Court to set aside the Agreed Settlement.

7. The attorneys for Plaintiff Hijinio Silva accumulated 275.5 billable hours from July 6, 1976, through October 1, 1976. The attorney for Noel Perez, realigned as Plaintiff on September 2, 1976, accumulated 23 billable hours from July 6, 1976, through October 1, 1976. The attorney for Rudy Gonzales, realigned as Plaintiff on September 2, 1976, accumulated 40.5 billable hours from July 6, 1976, through October 1, 1976.

8. A reasonable attorney's fee is \$50.00 per hour.
Conclusions of Law:

1. Jurisdiction is proper before a single Judge Court. (See Order of September 26, 1976.)

2. The Agreed Settlement of May 31, is a valid consent agreement and is to be enforced.

3. The 1976 Plan has been precleared according to § 5 of the Voting Rights Act (42 U.S.C. § 1973c).

4. An award of reasonable attorney's fees incurred from July 6, 1976, is proper in this cause. (42 U.S.C. § 19731 (e))

5. Frio County itself is solely liable for attorney's fees awarded, and that the named defendants are not liable individually for any part of this award.

The Court therefore ORDERS

1. That Frio County pay MALDEF the sum of \$6,000.00 as agreed in the May 31, 1976, settlement.

2. That Frio County pay to MALDEF the sum of \$13,775.00 to reimburse it for the services of Joaquin C. Avila and Albert A. Kauffman from July 6, 1976, through October 1, 1976.

3. That Frio County pay Noel Perez the sum of \$1,150.00 to reimburse him for the services of Luis Segura from July 6, 1976, through October 1, 1976.

4. That Frio County pay Rudy Gonzales the sum of \$2,025.00 to reimburse him for the services of George Korbel from July 6, 1976, through October 1, 1976.

ENTERED this 4th day of October, 1976.

S/DARWIN W. SUTTLE
United States District Judge

APPENDIX C

ORDER AND FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE U.S.

DISTRICT COURT

DATED SEPTEMBER 26, 1976 (THREE JUDGE)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

HIJINIO SILVA, ET AL

V.

R. D. FITCH, ET AL

SA-76-CA-126

ORDER

On September 2, 1976, came on to be heard Plaintiff's Motions asking the Court to enjoin permanently any election held under the Defendant's August 16, 1973, Redistricting Plan and to order the holding of elections scheduled under the terms of an agreed settlement between Plaintiffs and Defendants on May 31, 1976. The Court, on the basis of stipulated facts and the evidence presented, enters the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. The August 16, 1973, Redistricting Plan (1973 Plan) changing the precinct voting boundaries in Frio County, Texas, was neither precleared by the Department of Justice nor precleared by a declaratory judgment of the District Court of the District of Columbia.

2. The Agreed Settlement of May 31, 1976, (1976

Plan) (entered by the Court *nunc pro tunc* June 28, 1976) changing the precinct voting boundaries in Frio County, Texas, was entered into by the Defendants voluntarily and not as the result of fraud or compulsion.

3. The 1976 Plan was precleared by the Department of Justice on August 24, 1976.

4. To conduct the September 4, 1976, election scheduled under the terms of the 1976 agreement, the parties have printed ballots, acquired polling places and made arrangements for the presence of election officials.

CONCLUSIONS OF LAW

1. Jurisdiction is proper before a three-judge Court. (42 U.S.C. § 1973c; 28 U.S.S. §§ 1343 (c), 2283)

2 The 1973 Plan is within the "coverage" of § 5 of the Voting Rights Act. (42 U.S.C. §§ 1973b (b), 1973c)

3. The 1976 Plan is a valid consent agreement.

4. The 1976 Plan has been precleared according to § 5 of the Voting Rights Act. (42 U.S.C. § 1973c)

The Court therefore ORDERS:

1. That the Defendants, their agents, employees, successors in office, and all persons acting in concert or in participation with any of them be permanently enjoined from implementing any change in election precincts in Frio County, Texas, unless and until such redistricting is precleared according to the provisions of S5 of the Voting Rights Act of 1965;

2. That the September 4, 1976, elections be held as scheduled;

3. That the three-judge Court is hereby dissolved and all remaining issues in this cause are remanded to the single-judge Court.

ENTERED this 20th day of September, 1976.

S/JOHN H. WOOD, JR.
United States Circuit Judge, Fifth Circuit

S/DARWIN W. SUTTLE
United States District Judge

S/THOMAS G. GEE
United States District Judge

APPENDIX D

ORDER VACATING JUDGMENT OF THE
U.S. DISTRICT COURT
DATED AUGUST 5, 1976 (THREE JUDGE)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

HIJINIO SILVA, CARMELINA TREVINO,
ARNALDO HERNANDEZ, MODESTA SALAZAR,
and ANITA GARZA, Individually and on behalf
of All Others Similarly Situated,

vs.

R. D. FITCH, Individually and in His
Official Capacity as Frio County,
Texas, County Judge; WILLIAM A. BOYD,
JAMES C. STACY, and OWEN LESTER,
and NOEL PEREZ, Individually and in Their
Official Capacities as County Commissioners
of Frio County, Texas; MONA HOYLE,
Individually and in Her Official Capacity as
Frio County, Texas, County Clerk;
BENNY C. SANDERS, Individually and in
His Official Capacity as Sheriff of
Frio County, Texas; YANCEY BARNHART,
Individually and in His Official Capacity as
Democratic Party Chairman of Frio County,
Texas; RUDY GONZALES, Individually and
in His Official Capacity as Raza Unida Party
Chairman of Frio County, Texas; and
Frio County, Texas.

SA-76-CA-126

ORDER VACATING JUDGMENT

The motion of defendants, R. D. Fitch, William A. Boyd, James C. Stacy, Owen Lester, Mona Hoyle, Benny C. Sanders, and Yancey Barnhart, for an order vacating prior order or judgment coming on regularly to be heard, and it appearing that said judgment pur-

ports to be a consent judgment wherein in fact it was not agreed to by many of the defendants and is therefore void, IT IS THEREFORE:

ORDERED that the final order or judgement herein dated June 28, 1976, be vacated.

Dated at San Antonio, Texas, this 5th day of August 1976; at 3:00 o'clock P.M.

S/THOMAS G. GEE
United States Circuit Judge, Fifth Circuit

S/JOHN H. WOOD, JR.
United States District Judge, Fifth Circuit
Western District

S/DARWIN W. SUTTLE
United States District Judge
Western District

APPENDIX E

ORDER ["CONSENT" ORDER] OF THE
U.S. DISTRICT COURT
DATED JUNE 28, 1976 (THREE JUDGE)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

HIJINIO SILVA, CARMELINA TREVINO,
ARNALDO HERNANDEZ, MODESTA SALAZAR,
and ANITA GARZA, Individually and on behalf
of All Others Similarly Situated,

vs.

R. D. FITCH, Individually and in His
Official Capacity as Frio County,
Texas, County Judge; WILLIAM A. BOYD,
JAMES C. STACY, and OWEN LESTER,
and NOEL PEREZ, Individually and in Their
Official Capacities as County Commissioners
of Frio County, Texas; MONA HOYLE,
Individually and in Her Official Capacity as
Frio County, Texas, County Clerk;
BENNY C. SANDERS, Individually and in
His Official Capacity as Sheriff of
Frio County, Texas; YANCEY BARNHART,
Individually and in His Official Capacity as
Democratic Party Chairman of Frio County,
Texas; RUDY GONZALES, Individually and
in His Official Capacity as Raza Unida Party
Chairman of Frio County, Texas; and
Frio County, Texas.

SA-76-CA-126

ORDER

In this cause of action in which the Plaintiffs and Defendants have resolved the various claims presented by the Plaintiffs' complaint, the Court hereby makes the following findings and orders:

(1) That this Court has jurisdiction of this cause under 42 U.S.C. § 1343(3) and (4);

(2) That Frio County is a political subdivision subject to the provisions of Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, et seq;

(3) That Plaintiffs sue individually and represent a class of Mexican Americans residing in Frio County, Texas;

(4) That the Defendants are sued in their individual and official capacities;

(5) That the Frio County, Texas, reapportionment plan of August, 1973, is an election practice or procedure, or standard or qualification for voting different from that in force on November 1, 1972. The reapportionment plan of August, 1973, was objected to by the U.S. Justice Department, pursuant to the Voting Rights Act of 1965, as amended;

(6) That the Plaintiffs timely filed this lawsuit on April 22, 1976, and are not guilty of any laches;

(7) That in Frio County, members of the County Commissioners Court, Justices of the Peace and Constables are all elected from identical election districts. Voting Precinct Chairmen are elected from voting precincts;

(8) That on May 31, 1976, Frio County submitted to the U.S. Department of Justice pursuant to the Voting Rights Act of 1965, as amended, a County Commissioner Court reapportionment plan which was

formulated after consultation with both the Plaintiffs and Defendants. On June 4, 1976, the U. S. Department of Justice pursuant to the Voting Rights Act of 1965, as amended, approved the May 31, 1976, Frio County Commissioners Court reapportionment plan;

(9) That Defendants will implement this May 31, 1976, reapportionment plan for newly scheduled primary elections, runoff primary elections, the general election in November, 1976, and similar county Commissioners may reapportion its commissioners' precincts;

(10) That since the primary and runoff primary elections were postponed by Order of this Court, pending approval by the U.S. Department of Justice, pursuant to the Voting Rights Act of 1965, as amended, new elections dates are necessary to conduct these elections for the year 1976. Both parties agree and the Court hereby orders that the following election schedule to be applicable to and effective only for the qualification and nomination for the 1976 election year for the primary elections of candidates for membership on the Frio County Commissioners Court and the positions of Constable, Justices of the Peace and Voting Precinct Chairmen:

- a. The opening of the period for candidate qualification shall be at 8:00 A.M. on the 28th day of June, 1976.
- b. The deadline for candidate qualification and filing shall be at 6:00 P.M. on the 19th day of July, 1976.
- c. The period for the request to vote absentee by mail for the first primary shall begin at 8:00

A.M. on the 6th day of July, 1976, and end on the 31st day of August, 1976, at 5:00 P.M. To be counted, such ballot must be received not later than 10:00 A.M. on the 2nd day of September, 1976.

- d. The period of absentee voting by personal appearance shall begin at 8:00 A.M. on the 16th day of August, 1976, and close on the 31st day of August, 1976, at 5:00 P.M.
- e. The first primary election shall be held on the 4th day of September, 1976, from 7:00 A.M. to 7:00 P.M.
- f. The period for the request to vote absentee by mail for the second primary shall begin at 8:00 A.M. on the 5th day of September, 1976, and end on the 28th day of September, 1976, at 5:00 P.M. To be counted, such ballot must be received not later than 10:00 A.M. on the 30th day of September, 1976.
- g. The period of absentee voting by personal appearance for the second primary shall begin at 8:00 A.M. on the 13th day of September, 1976, and shall close at 5:00 p.m. on the 28th day of September, 1976.
- h. The second or runoff primary, if necessary, shall be held on the 2nd day of October, 1976, from 7:00 A.M. to 7:00 P.M.

(11) That for the election year of 1976, the statutory residency requirement shall be suspended for the positions of Frio County Commissioners, Constables, Justices of the Peace, and Voting Precinct Chairmen, provided, however, that a candidate must

have been a resident of that particular county commissioner or voting precinct as delineated by the agreed reapportionment plan, since January 19, 1976.

(12) That all persons including those who have already filed as candidates for membership on the Frio County Commissioners Court, for the positions of Constable or for the positions of Justice of the Peace or Voting Precinct Chairmen shall be required to file for office within the time and under the terms of this Order in order to be eligible for nomination by primary election for membership on the Frio County Commissioners Court or the positions of Constable, Justice of the Peace, or voting Precinct Chairmen. Provided specifically, however, that candidates who have paid filing fees or filed petitions for nomination or have been exempted therefrom by judicial order shall not be required to pay an additional fee or file a new petition for nomination.

(13) That the persons who are, in fact, nominated by primary elections held under the provisions of this Order be certified as candidates for election in the regular general election to be held in November of 1976.

(14) That the Defendants are hereby ordered to act immediately to create new election precincts to comply with the Voting Rights Act of 1965, as amended. Upon approval by the U.S. Department of Justice, pursuant to the Voting Rights Act of 1965, as amended, such election precincts shall be in effect for the primary, runoff primaries, and general election scheduled for the year 1976 and hereafter, until changed in accordance with law.

(15) That the Defendants pay the Plaintiffs' attorneys an amount totalling \$6,000 (six thousand dollars and no cents) for reasonable attorneys fees and costs incurred in this cause of action.

(16) That the primary and runoff primary elections scheduled by this Order shall be financed by the State of Texas from the same appropriations from which other 1976 party primary elections were funded.

(17) This Order shall constitute the final judgment in this cause of action.

SIGNED and ENTERED at San Antonio, Texas, this 28 day of June, at 4:30 o'clock, p.m.

S/THOMAS G. GEE
United States Circuit Judge
Fifth Circuit

S/JOHN H. WOOD, JR.
United States District Judge
Western District

S/DARWIN W. SUTTLE
United States District Judge
Western District

SIGNED by U. S. District
Judge Darwin W. Suttle
on the 14th day of July, 1976

APPROVED AS TO FORM:

JOAQUIN G. AVILA
Attorney For Plaintiff

CRAIG L. AUSTIN
Attorney For Defendant

APPENDIX F

NOTICE OF APPEAL

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

HIJINIO SILVA, CARMELINA TREVINO,
ARNALDO HERNANDEZ, MODESTA SALAZAR,
and ANITA GARZA, Individually and on behalf
of All Others Similarly Situated,

vs.

R. D. FITCH, Individually and in His
Official Capacity as Frio County,
Texas, County Judge; WILLIAM A. BOYD,
JAMES C. STACY, and OWEN LESTER,
and NOEL PEREZ, Individually and in Their
Official Capacities as County Commissioners
of Frio County, Texas; MONA HOYLE,
Individually and in Her Official Capacity as
Frio County, Texas, County Clerk;
BENNY C. SANDERS, Individually and in
His Official Capacity as Sheriff of
Frio County, Texas; YANCEY BARNHART,
Individually and in His Official Capacity as
Democratic Party Chairman of Frio County,
Texas; RUDY GONZALES, Individually and
in His Official Capacity as Raza Unida Party
Chairman of Frio County, Texas; and
FRIO COUNTY, TEXAS,

SA-76-CA-126

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that R. D. FITCH, Individ-
ually and in his official capacity as Frio County, Texas
County Judge; WILLIAM A. BOYD, JAMES C.

STACY, and OWEN LESTER, Individually and in
their official capacities as County Commissioners of
Frio County, Texas; MONA HOYLE, Individually
and in her official capacity as Frio County, Texas,
Clerk; BENNY C. SANDERS, Individually and in his
official capacity as Sheriff of Frio County, Texas;
YANCEY BARNHART, Individually and in his offi-
cial capacity as Democratic Party Chairman of Frio
County, Texas, and FRIO COUNTY, TEXAS, the
defendants above-named, hereby appeal to the Su-
preme Court of the United States from the final Judg-
ment of October 5, 1976 and the Orders of October 4,
1976, September 26, 1976 and June 28, 1976 to which it
pertains adjudging that, "The 1976 Plan is a valid
consent agreement" (as embodied in the Order of June
28, 1976) and the permanent injunction and award of
attorney fees adjudged as dependent thereon.

This appeal is taken pursuant to Title 28, United
States Code, Section 1253 and 42 USCS 1973b.

Dated October 22, 1976.

JAMES WARREN SMITH, JR.
County Attorney
Frio County, Texas
P. O. Box V
Pearsall, Texas 78061

HARVEY L. HARDY
1600 N.E. Loop 410, Suite 130
San Antonio, Texas 78209

Attorneys For Defendants
FRIO COUNTY, R. D. FITCH, WILLIAM A. BOYD,
JAMES C. STACY, OWEN LESTER, MONA HOYLE,
BENNY C. SANDERS, and YANCEY BARNHART

S/HARVEY L. HARDY

By: _____
HARVEY L. HARDY

CERTIFICATE OF SERVICE

I, Harvey L. Hardy, a member of the Bar of the Supreme Court of the United States and counsel of record for Frio County, R. D. Fitch, William A. Boyd, James C. Stacy, Owen Lester, Mona Hoyle, Benny C. Sanders, and Yancey Barnhart, appellants herein, hereby certify that on October 22, 1976, pursuant to Rule 33, Rules of the Supreme Court, I served a copy each of the foregoing Notice of Appeal to the Supreme Court of the United States on each of the parties herein, as follows:

On Hijinio Silva, Carmelina Trevino, Arnaldo Hernandez, Modesta Salazar, Anita Garza, Rudy Gonzales, and Noel Perez, appellees herein, by depositing such copies in the United States Post Office, San Antonio, Texas, with first class postage prepaid, properly addressed to the post office address of Albert H. Kauffman, the above named Hijino Silva, Carmelina Trevino, Arnaldo Hernandez, Modesta Salazar and Anita Garza's counsel of record, at 501 Petroleum Commerce Building, 201 N. St. Mary's Street, San Antonio, Texas 78205, and to Mr. Luis M. Segura, the above named Noel Perez's counsel of record, at 523 South Main, San Antonio, Texas, and to Mr. George J. Korb, the above named Rudy Gonzales' counsel of record, at Apt. 1801, 7200 S. Presa, San Antonio, Texas

All parties required to be served have been served.

Dated this 22nd day of October, 1976.

HARVEY L. HARDY

HARVEY L. HARDY
1600 N.E. Loop 410
Suite 130

—30—

SPECIAL APPENDIX

PAGE REFERENCES TO KEY TESTIMONY GIVEN AT THREE JUDGE COURT HEARING OF SEPTEMBER 2, 1976

Page References To Key Testimony Given At
Three Judge Court Hearing of September 2, 1976

(Page Numbers are those of Court Reporter's
typewritten Transcript)

1. Pages 10-11 & 18—Attorney Austin testified as to his representations pertaining to no reapporportionment until 1981.
2. Page 14 — Austin testified that he was hired to represent Frio County and not others. Lines 19, 22, 23.
3. Page 16 — Austin testified that Sheriff Sanders and County Chairman Yancey were not present when the settlement was voted. Line 7.
4. Page 22 — Austin testified defendant Gonzales "defaulted". Line 13.
5. Page 23 — Austin testified he did not submit the consent order to the defendants and get their concurrence. Line 21.
6. Page 26 — Austin admits he made misstatements in writing in re the **Beer** case. Lines 18, 21.
7. Pages 31-32 — Commissioner Boyd testified he

—31—

agreed to order only because of representation re no reapportionment until 1981.

8. Pages 36-37 — Commissioner Lester testified he abstained. Corroborates testimony in re 1981 date.
9. Pages 40-41 — County Judge Fitch testified he agreed to order only because of 1981 representation.
10. Page 46 — Commissioner Stacy verifies that Attorney Austin made the 1981 representation to the members of the Commissioners' Court.
11. Page 49 — County Clerk Hoyle verifies that Attorney Austin made the 1981 representation to the Commissioners' Court.
12. Pages 55-59 — Tax Assessor-Collector Nations begins to testify and his affidavit that three out of four commissioner precincts under the 1973 plan had a majority of registered voters of Mexican ancestry is received in evidence and stipulated to by all attorneys as what his testimony to such effect would have been.

JAN 21 1977

MICHAEL RODAK, JR., CLERK

**In the
Supreme Court of the United States**

OCTOBER TERM, 1976

NO. 76 - 818

R. D. FITCH, ET AL.,

Appellants

VS.

HIJINIO SILVA, ET AL.,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF TEXAS

APPELLEES' MOTION TO AFFIRM THE TRIAL
COURT JUDGMENT

Joaquin G. Avila
Albert H. Kauffman
Mexican American Legal Defense
and Educational Fund, Inc.
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By: Joaquin G. Avila

Vilma S. Martinez
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San Francisco, CA. 94103

Attorneys for Appellees

In The
Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-818

R. D. FITCH, Individually and in His Official Capacity as Frio County, Texas, County Judge; WILLIAM A. BOYD, JAMES C. STACY, and OWEN LESTER, Individually and in Their Official Capacities as County Commissioners of Frio County, Texas; MONA HOYLE, Individually and in Her Official Capacity as Frio County, Texas, County Clerk; BENNY C. SANDERS, Individually and His Official Capacity as Sheriff of Frio County, Texas; YANCEY BARNHART, Individually and in His Official Capacity as Democratic Party Chairman of Frio County, Texas; and FRIO COUNTY, TEXAS

Appellants

VS.

HIJINIO SILVA, CARMELINA TREVINO, ARNALDO HERNANDEZ, MODESTA SALAZAR, ANITA GARZA, NOEL PEREZ and RUDY GONZALES,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

APPELLEES' MOTION TO AFFIRM THE TRIAL COURT
JUDGMENT

COME NOW Appellees in this appeal and move the United States Supreme Court to affirm the trial court Order entered on September 26, 1976, and the final judgment entry of

October 5, 1976. This Motion is based upon the accompanying Memorandum of Points and Authorities In Support of the Motion to Affirm.

Dated: January

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Mike Baller
Linda Hanten
Mexican American Legal
Defense and Educational
Fund, Inc.
145 Ninth Street
San Francisco, CA. 94103

Joaquin G. Avila
Albert H. Kauffman
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501 Petroleum Commerce
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San Antonio, Texas 78205

By: Joaquin G. Avila

Attorneys for Appellees

In The
Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-818

R. D. FITCH, Individually and in His Official Capacity as Frio County, Texas, County Judge; WILLIAM A. BOYD, JAMES C. STACY, and OWEN LESTER, Individually and in Their Official Capacities as County Commissioners of Frio County, Texas; MONA HOYLE, Individually and in Her Official Capacity as Frio County, Texas, County Clerk; BENNY C. SANDERS, Individually and His Official Capacity as Sheriff of Frio County, Texas; YANCEY BARNHART, Individually and in His Official Capacity as Democratic Party Chairman of Frio County, Texas; and FRIO COUNTY, TEXAS

Appellants

VS.

HIJINIO SILVA, CARMELINA TREVINO, ARNALDO HERNANDEZ, MODESTA SALAZAR, ANITA GARZA, NOEL PEREZ and RUDY GONZALES,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF APPELLEES' MOTION TO AFFIRM

Appellees are filing this Motion to affirm the lower court judgment and orders, pursuant to Rule 16, 1(c) of the Rules of the Supreme Court on the grounds that the "questions on

which the decision of the cause depends are so unsubstantial as not to need further argument." Appellees are not challenging the jurisdiction of this Court since an appeal from a final judgment of a duly constituted Three Judge Court lies to the United States Supreme Court. 28 U.S.C. § 1253; 42 U.S.C. § 1973c. Since the Statement of the Case as presented by the Appellants in this case is incomplete, a more fully developed discussion is presented below.

STATEMENT OF CASE

Appellees filed this action in the United States District Court for the Western District of Texas to enforce the statutory protections afforded by the Voting Rights Act of 1965, as amended in 1975. 42 U.S.C. § 1973 *et. seq.* Section 5 of the Act, 42 U.S.C. § 1973c requires all covered jurisdictions in Texas to submit all post November 1, 1972 changes in voting procedures and practices to the United States Attorney General or the United States District Court for the District of Columbia for a determination that the proposed change in voting procedure does not have a discriminatory purpose or effect and does not discriminate against persons because of their membership in a language minority group.

As this Court clearly outlined, actions to *enforce* the provisions of the Voting Rights Act may be maintained in any covered jurisdiction where venue is proper. *Allen v. State Bd. of Elections*, 393 U.S. 544, 89 S.Ct. 817, 22 L. Ed. 2d 1 (1969). However any substantive Section 5 determination can only be made in the United States District Court for the District of Columbia, or by the United States Attorney General whose offices are located in Washington, D.C. In filing this cause of action, Appellees merely sought to enforce the provisions of the Voting Rights Act and not to review any

substantive determinations made by the United States Attorney General pursuant to Section 5 of the Act. Thus the factual adjudication required of the Three Judge District Court can be summarized as follows:

- 1) Is the political subdivision a Section 5 covered jurisdiction.
- 2) Was there a change in voting procedure enacted after November 1, 1972.
- 3) Has the change in voting procedure been pre-cleared by the United States Attorney General or the United States District Court for the District of Columbia.

These factual adjudication were directly applicable to the case at bar. Frio County, Texas is a political subdivision subject to Section 5 of the Voting Rights Act of 1965, as amended in 1975. 40 Fed. Register No. 185, at 43746 (Sept. 23, 1975). On July 13, 1973, the Frio County Commissioners' Court reapportioned the Commissioner Precincts. Plaintiffs' Exhibit A, September 2, 1976 Trial. These Commissioner Precincts are the election districts for the offices of County Commissioner, Constable, and Justice of the Peace. Although Frio County was notified of its obligation pursuant to Section 5 to preclear this change in voting procedure on August 25, 1975 and on November 26, 1975, Plaintiffs' Exhibits B, C, September 2, 1976 Trial, Frio County did not submit the reapportionment plan to the Department of Justice until February 17, 1976. On April 16, 1976, the Department filed an objection to the proposed change in voting procedure. Plaintiffs' Exhibit D, September 2, 1976

Trial. Despite the objection interposed by the Department of Justice, Frio County intended to conduct the May 1, 1976 primary elections pursuant to the objectionable 1973 reapportionment plan. Stipulation of Fact No. 15, September 2, 1976 Trial. Thus Appellees filed this lawsuit seeking to enforce federal law.

After securing on April 28, 1976 a Temporary Restraining Order enjoining the May 1, 1976 primary elections, the Appellees and the Frio County Commissioners Court entered into extensive negotiations to reformulate a reapportionment plan and draft an order which could possibly form the basis of an agreed order. The evidence produced at the September 2, 1976 trial, indicates that "during the negotiations between the plaintiffs [Appellees] and defendants [Appellants] in this action, the plaintiffs adopted all of the defendants' suggestions into the final terms of the June 28, 1976 Court Order." Stipulation of Fact No. 44, September 2, 1976 Trial. These changes included adoption of their requests to preserve incumbency, the inclusion of the Courthouse in Commissioner Precinct No. One (1), the negotiation of attorney fees, changes in the wording of Paragraph 12 of the June 28, 1976 Order, the inclusion of a six month residency period, the deletion of an objectionable absentee ballot provision, and the incorporation of an election schedule proposed by the Appellants.

After agreeing to the terms of the proposed Order, this Order was signed by the legal representatives of both parties and filed by the Three Judge Court on July 6, 1976 and entered nunc pro tunc as of June 28, 1976. Order of June 28, 1976. Subsequently thereafter, the Appellants released their first counsel and hired Mr. Harvey L. Hardy to set aside the agreed Order. The basis for seeking to set aside the Order

are the same grounds advanced by Appellants in this Appeal. The July 6, 1976 Court Order entered nunc pro tunc as of June 28, 1976 was vacated without a hearing by the Three Judge Panel on August 5, 1976. Order of August 5, 1976. In order to preserve the integrity of the election process established by the July 6, 1976 Court Order, the convening judge granted an additional Order on August 13, 1976, extending the terms of the election schedule until the September 2, 1976 trial.

At the September 2, 1976 trial, the Three Judge Panel concluded that the reapportionment plan and the election schedule established by the July 6, 1976 Court Order, entered nunc pro tunc as of June 28, 1976, should be reinstated. September 26, 1976 Court Order. It is the reinstatement of this agreed Order which Appellants now seek to challenge. Appellants contend that the Three Judge Panel abused its discretion in reinstating the terms of the agreed Order. Appellees will address each of the points raised by Appellants in their appeal.

I. Failure To Have A Trial On The Merits

Appellants have confused this cause of action seeking to enforce the provisions of the Voting Rights Act with a Section 5 substantive judicial determination which can only be instituted in the United States District Court for the District of Columbia. Appellants are seeking a "hearing in this case on the merits of the reapportionment of Frio County...." Appellants' Jurisdictional Statement at 6. As previously indicated a trial in an enforcement proceeding involving the Voting Rights Act is confined to a limited inquiry. The Three Judge Panel in the Western District of Texas had no jurisdiction to evaluate the merits of any reapportionment plan.

Instead of instituting a lawsuit in the District of Columbia, the Appellants decided to negotiate a settlement. This settlement was authorized by the County Commissioners Court. After the settlement had been filed, the Appellants decided to invalidate the agreed Order. Although the Appellants claimed misrepresentation and fraud on the part of the first Special Attorney, the convening Judge aptly noted, "It just seems to me as if there's been a change of minds on the part of the Commissioners' Court," Transcript at 84, August 13, 1976 hearing. There was a full trial on the merits to determine whether the agreed Order should be reinstated on September 2, 1976.

The "trial on the merits" which occurred on September 2, 1976 was initially limited to determine whether the 1973 reapportionment should be enforced. After resolving this issue in favor of Appellees, the Three Judge Panel then focused on the issue of whether to reinstate the terms of the previously entered agreed Order. Thus the Appellants had their "trial on the merits" for those issues which could properly be considered by the Three Judge Panel. There is no denial of due process under these circumstances.

II. The Trial Court Did Not Abuse Its Discretion

Whenever a lawsuit is instituted against a county in Texas it is the responsibility of the County Commissioners' Court to defend the action. The County Commissioners' Court to defend the action. The County Commissioners' Court, which is comprised of a County Judge and four elected members, upon the agreement of any three members, Texas Vernon's Ann. Civ. Statute Art. 2343, have the authority to settle a lawsuit filed against the County. *O'Quinn v. McVicker*, 428 S.W. 2d 111, 112 (Civ. App. Tex. 1968) ("Such Commission-

ers Court has authority to cause suits to be instituted or defended in the name of and for the benefit of the county....") Other officials cannot determine whether a lawsuit filed against a county will be settled, particularly the County Clerk, the Sheriff and the Democratic Party Chairman. Thus, their opposition to a proposed settlement is without legal significance.

These "other" officials were added to the lawsuit merely as nominal parties to effectuate any relief granted by the Three Judge Court. As pointed out by Appellants, these officials are part of the county election board. Appellants' Jurisdictional Statement at 7. Any Court relief requiring the institution of a new election schedule will necessarily affect the duties of these election board officials. Since they will be required to perform functions in conducting a new election, these officials had to be made subject to the equitable relief granted. If this were a damage action different considerations would apply. However, in an equitable proceeding where an Order requires the performance of specific duties mandated by law, the officials responsible for the performance of these duties will by definition have to be named in the Order. For these reasons, the Sheriff, the County Clerk, and Party Chairman were added as parties.

Appellants also contend that the Special Attorney misrepresented the law to the Commissioners Court. If the law had not been misrepresented, there would not have been the necessary quorum to settle the lawsuit. However, the Three Judge Court listened to the testimony of the Appellant Commissioners claiming fraud and found those contentions specious at best. The Appellant Commissioners advanced two contentions. First, they asserted that the Special Attorney advised the Commissioners' Court of their inability to re-

apportion until 1981. However, when examined in its proper perspective the advice is legally sound. The Special Attorney gave this advice in describing the various alternatives to the Commissioners' Court. One alternative was to go to trial and possibly have the Court institute a reapportionment plan. Once the Court ordered plan was in effect, "...another reapportionment by the Commissioners' Court prior to the new census would be inviting contempt of Court and would be inviting another lawsuit by the Plaintiffs...." Transcript at 11, September 2, 1976 Trial. In any event, the Three Judge Panel chose to believe the Special Attorney and rejected Appellants' contention.

The second allegation of misrepresentation concerned the explanation of the *Beer* case. *Beer v. U.S.*, U.S. , 96 S. Ct. 1357, L. Ed. 2d (1976). According to the Appellants, the Special Counsel failed to inform the Commissioners' Court that the District Court decision in *Beer* had been reversed. Although the Special Attorney was not aware of this reversal, he indicated that his advice was not predicated upon the *Beer* holding. Transcript at 10, September 2, 1976 Hearing. Since there was a constitutional claim of malapportionment which could be raised, the Special Attorney advised his clients that it was highly disadvantageous to await a court-ordered reapportionment plan. Instead of engaging in protracted litigation, the avenue of settlement was the most reasonable course to follow.

Not all of the Commissioners' Court chose to abide by the Special Attorney's advice. As noted by the Appellants, two of the County Commissioners did not vote in favor of settlement. Appellants' Jurisdictional Statement at 7. This negative vote by these two Commissioners further discredited the testimony of the Appellant Commissioners who now claim

that they were misled. At all times, the Commissioners' Court could have instituted a Section 5 proceeding in the United States District Court for the District of Columbia to seek a reversal of the U. S. Attorney General's letter of objection. The Commissioners' Court, however, chose to settle. Since the Three Judge Panel did not find any fraud or misrepresentation, the Court reinstated the terms of the July 6, 1976 Court Order, entered *nunc pro tunc* as of June 28, 1976.

Appellants other contentions concerning the lack of authority of the Special Attorney to negotiate on behalf of the Sheriff, County Clerk, and Democratic Party Chairman, and the failure to secure consent from these officials to the agreed Order are equally without merit. As to the lack of authority to represent these officials, Appellees maintain that an attorney-client relationship existed as early as April 28, 1976. Transcript at 2, April 28, 1976 Hearing. In the April 28, 1976 hearing, the Special Attorney announced that he represented the Sheriff, County Clerk, and the Democratic Party Chairman. This relationship continued until the Special Attorney was formally released from his duties. Moreover, at all times, these officials could have retained counsel to represent their interests, if any, during the negotiations which resulted in the entry of the Consent Decree. Since these officials failed to notify the Court or the Appellees' attorneys of their desire to terminate the services of the Special Attorney, they should now be estopped from denying the existence of this attorney-client relationship.

With respect to their lack of consent, Appellees have previously indicated that only the Commissioners' Court can defend and settle a lawsuit. Even if the Supreme Court determines that their consent was necessary, the participation of

these Appellants in the negotiating process certainly supported the Three Judge Panel's rejection of this contention. As noted in Stipulation of Fact Number 44, September 2, 1976, Trial, "...during the negotiations between the plaintiffs and defendants in this action, the plaintiffs adopted all of the defendants' suggestions into the final terms of the June 28, 1976 Court Order." These suggestions included a proposed election schedule submitted by the County Clerk and the Democratic Party Chairman, Stipulation of Fact No. 42, September 2, 1976 Trial, officials who now contend they never acquiesced to the terms of the agreed Order. In the final analysis, the evidence simply does not support the Appellants contentions.

In view of this presentation, the instant appeal only presents the question of whether the Three Judge Panel abused its discretion in reinstating the terms of the agreed Order. The evidence adduced in the proceedings below clearly does not justify reversing the Judgment reinstating the agreed Order. Since the Appellants have not sought any Section 5 review in the United States District Court for the District of Columbia, the only remaining questions for consideration on appeal are so unsubstantial as not to need further argument.

Dated: January Respectfully submitted,

Vilma S. Martinez
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Linda Hanten
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Joaquin G. Avila
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Fund, Inc.
501 Petroleum Commerce
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San Antonio, Texas 78205

By: _____
Joaquin G. Avila

Attorneys for Appellees

PROOF OF SERVICE

I certify that on this the 21st day of January, 1977 copies of the Appellees' Motion To Affirm The Trial Court Judgment and Memorandum Of Points and Authorities In Support of Appellees' Motion To Affirm were sent to the following attorneys of record for Appellants:

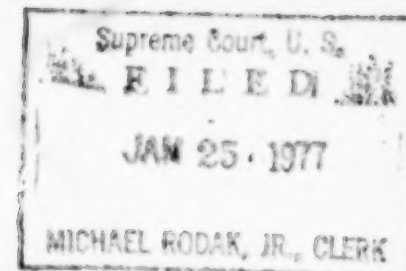
Harvey L. Hardy, Esq.
1600 N. E. Loop 410
Suite 130
San Antonio, Texas 78209

James W. Smith, Jr.
Frio County Attorney
P. O. Box V
Pearsall, Texas 78061

by depositing same in the United States Post Office with proper postage affixed thereto.

All parties required to be served have been served.

Dated: January



NO. 76-818

IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

R. D. FITCH, ET AL., APPELLANTS

V.

HIJINIO SILVA, ET AL., APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF TEXAS

MOTION TO AFFIRM

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APPELLEES

January 19, 1977

7

NO. 76-818

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

R. D. FITCH, ET AL, APPELLANTS

V.

HIJINIO SILVA, ET AL, APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF TEXAS

MOTION TO AFFIRM

Now comes Rudy Gonzales and Noel Perez
and move this Court to dismiss the appeal of
R. D. Fitch, et al, or in the alternative that the
decision below be affirmed.

(2)

STATEMENT OF THE CASE

As admitted by the Appellants in their Jurisdictional Statement, the issue presented to this Court does not deal with the Voting Rights Act (42 U.S.C. § 1973(c), et. seq.), its constitutionality or even the correctness of its application to the State of Texas. (J.S. 2-3). ^{1]} Rather this Court is being asked to consider whether the Three Judge District Court was correct in entering a consent decree which was the result of an open negotiation in which the Appellants themselves as well as their counsel took an open and active role. (Id.).

The uncontested facts establish that the apportionment of the Frio County Texas Commissioners Court ^{2]} was objected to by the U. S. Department of Justice as being violative of the Voting Rights Act. Immediately thereafter, on April 22, 1976, the Appellees Silva and others

^{1]} J. S. refers to the Jurisdictional Statement. A. J. S. refers to the Appendix to the Jurisdictional Statement included in Petitioner's Jurisdictional Statement at 12-31.

^{2]} In Texas the County Commission is referred to as the Commissioner Court. Under the State Constitution a Commissioners Court is comprised of a County Judge, elected at large, and four (4) Commissioners elected from districts.

(3)

filed suit in Federal Court to enjoin the use of the objected to plan for the 1976 election year. The Defendants named were the members of the Commissioners Court who by law are required to apportion the County. (A.J.S. 23). In addition the County Clerk, the Sheriff and the Chairperson of the Democratic and Raza Unida Parties were sued because, under state law, they comprise the county election Board which has the duty to carry out the logistics of elections including ordering the ballots, designating the polling places and collecting the ballots. As such, they were included solely to insure that injunctive relief, should it be granted, would run against all persons responsible for holding the election.

At a hearing on the Temporary Restraining Order held April, 1976, the single Judge granted the Restraining Order and requested that Chief Judge Brown name a three Judge panel to hear the substantive issues before the Court. During this first hearing on the Temporary Restraining Order all named Defendants (Appellants before this Court) were present in person as well as the County Attorney and a special County Attorney hired by the County to represent the County Officials. In open Court, in front of all the Defendants, the special County Attorney entered an appearance on behalf of all Defendants except Rudy Gonzales, the Frio County Chairman of the Raza Unida Party, who was present and chose to represent himself and Commissioner Noel Perez who was represented by Luis M. Segura.

(4)

Thereafter, counsel for the County Officials entered into talks with the Plaintiffs which culminated in an open negotiation session in which both the County Officials and the Plaintiffs, themselves, took open and active roles. At that session, held May 31, 1976, the members of the Commissioners Court voted to agree to a compromise apportionment of Frio County and to a specified amount as attorneys' fees to the counsel for Plaintiffs. The County Officials who are charged by law with the logistical operation of the elections were consulted and new elections were set according to their specifications allowing time to print ballots, conduct absentee voting and the like. All agreements were reduced to writing approved by counsel for both parties in the form of a consent order and presented to the Three Judge Court as a final settlement. This Order was dated June 28, 1976, and appears in A. J. S. at 22-27.

Thereafter, the County Defendants, with the exception of Commissioner Noel Perez, became dissatisfied with the compromise, discharged their Special County Attorney and hired a new Special County Attorney. This new Special County Attorney filed a Motion to vacate the original Consent Decree alleging *inter alia* fraud and malfeasance on the part of the original Special County Attorney. The Motion to Vacate was supported by affidavits of several of the County Officials setting out in very broad, non-specific terms what they considered as constituting fraud and malfeasance. On August 5, 1976, the Three Judge District vacated the Consent Decree and set the cause down for hearing on

(5)

September 2, 1976. Thereafter, defendants, Rudy Gonzalez, The Raza Unida Party Chairman and Noel Perez, one of the members of the Commissioners Court, moved in separate documents to be realigned as Parties Plaintiff, alleging that the actions of the other members of Commissioners Court were harmful to the interests of the population of Frio County and intended only to perpetuate themselves in office. These motions were unopposed by the new Special County Attorney and Gonzales and Perez were realigned.

On the motion of the Plaintiffs and with no opposition from the Defendants, the hearing on September 2, 1976, was consolidated with a trial on the merits. At the trial, the Defendant County Officials adduced evidence through seven (7) witnesses. The testimony was subjected to cross-examination by counsel for the original Plaintiffs as well as for the realigned Defendants. At the conclusion of the hearing, the Court read an oral Order from the bench finding against all contentions of the defendant County Officials and for the Plaintiffs on all counts. A written Order was entered by the Court on September 20, 1976, and appears at A. J. S. 17 - 19. Specifically the three Judge Court found that "the agreed settlement of May 31, 1976, . . . (entered by the Court *nunc pro tunc* June 28, 1976) changing the precinct voting boundaries in Frio County, Texas, was entered into by the Defendants voluntarily and not as a result of fraud or compulsion." (id. at 18). The remaining issues in the case were remanded to the originating Judge to

(6)

handle as single Judge matters. (Id. at 19).

On October 1, 1976, a hearing was held on remaining issues. After testimony, the Court awarded attorneys' fees to the counsel for the Plaintiffs at the rate of Fifty (\$50.00) Dollars per hour. (A. J. S. at 14-17).

This Motion to Affirm is filed on behalf of the original parties Defendant, Rudy Gonzales and Noel Perez, who were realigned as parties Plaintiff. An additional Motion to Affirm is expected to be filed by the original Plaintiffs, Hijinio Silva, et al.

ARGUMENT

THERE IS NO SUBSTANTIAL FEDERAL QUESTIONS PRESENTED BY THIS APPEAL

As the facts clearly make out, the County Officials are unhappy with the Consent Decree they entered into. The Three Judge Court heard their evidence and unanimously found that the settlement was made "voluntarily and not as the result of fraud or compulsion". (A. J. S. 18). In plain English, the Defendants attempted to fishtail or welsh 'on their compromise. The Court refused to allow them such latitude.

Appellant County Officials argue somehow that they have had no due process and have been denied a full hearing of their position. They claim

(7)

that they were confused by the advice of their first Special County Attorney and hint at unethical practice on his part. Their position strains credibility. They somehow choose to ignore the fact that there was a full trial on the merits in this case conducted by their second Special County Attorney at which seven witnesses appeared and testified. At the trial all three Federal Judges dismissed their claims as being absolutely without merit. (A. J. S. 17 - 18). In fact, the Court was so concerned about the insinuation of misdealing on the part of the first Special Attorney as to issue an Order in which his conduct was approved.

In such posture, this case presents at best the situation of disappointed litigants appealing solely on the basis of their disappointment. They cite no cases other than those supporting an opportunity to be heard. They had such an opportunity. A trial on the merits was held. (A. J. S. 17 - 19). They lost. In order to appeal they must frame issues to justify the appeal, not continue to complain about their loss.

CONCLUSION

There are no substantial federal issues and certainly no constitutional questions raised by the Appellants in the narrow prospectus presented by this case. Indeed, the result which they seem to seek from this Court would logically end only in a reconsideration on remand of the advice given by the first Special Attorney. His activities have already

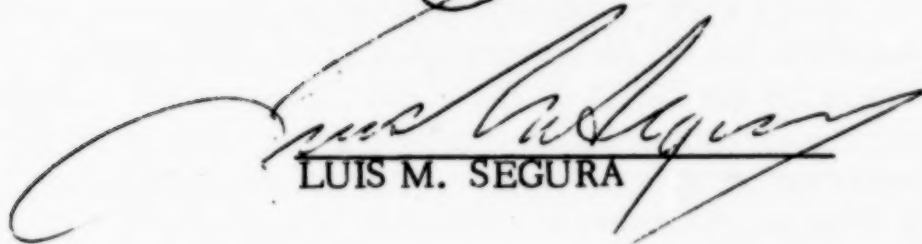
(8)

been the subject of intense scrutiny and no problems whatsoever were found by the District Court. A second such examination would not only be pointless but also wasteful of judicial energy.

WHEREFORE, PREMISES CONSIDERED, this Court should affirm the Judgment of the Court below.

Respectfully Submitted,


GEORGE J. KORBEL

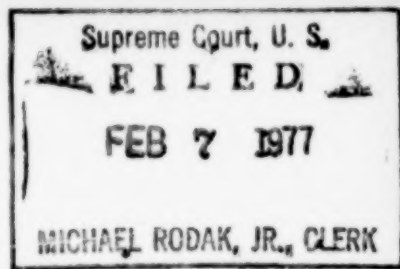

LUIS M. SEGURA

(9)

CERTIFICATE OF SERVICE

The undersigned, a member of the bar of this Court, hereby certifies that three copies of the foregoing motion has this the 21st day of January, 1977, been served upon each counsel of record in accordance with the Rules of this Court, by depositing the same in the United States mailbox, with first class postage, prepaid, addressed to said counsel at their post office addresses.


GEORGE J. KORBEL



No. 76-818

IN THE
Supreme Court Of The United States

OCTOBER TERM, 1976

R. D. FITCH, ET AL.,
Appellants,

VS.

HIJINIO SILVA, ET AL.,
Appellees.

**APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT
OF TEXAS**

**APPELLANTS' BRIEF OPPOSING
APPELLEES' MOTIONS TO AFFIRM**

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Now come Appellants and, pursuant to Rule 16(4) of this Court, and file this their brief opposing the "Motions to Affirm" heretofore filed by the Appellees (two motions).

NOMINAL PARTIES?

These motions are predicated on several fallacious considerations. Unable to deny the stark fact that several of the defendants in this case neither agreed to the "consent judgment," nor were given an opportunity to make a choice in the matter, Appellees seek to sweep this very basic violation of constitutional due

process aside by claiming that these parties were "nominal" parties.

This contention that the Sheriff (Sanders), County Chairman (Barnhart), and County Clerk (Hoyle) were nominal parties is not supported by the record. They were neither named nor described as nominal parties in the plaintiffs' pleadings, or in the temporary injunction order, or in the consent judgment in question. Indeed, in said judgment (the principal judgment in this case) they are each made fully responsible, by necessary implication, for complete compliance therewith.

Contrary to a statement contained on page (4) of the motion of Appellees Gonzales and Perez, not all of the defendants took "an open and active role" in settlement negotiations. Sheriff Sanders for one did not. Neither did Chairman Barnhart.

Further, to negotiate is not to agree and none of the non-commissioner defendants ever agreed to the so-called consent judgment. Indeed, the attorney claiming to represent them has admitted that he did not submit the judgment to them and request their assent or dissent. See transcript of the September 2 hearing, page 15, line 25, continuing on page 16, lines 1 through 7; page 21, lines 14 through line 25 and continuing on page 22, lines 1 through line 17; page 23, lines 17 through line 25.

Mr. Smith has denied Mr. Austin's hearsay assertion that he (Smith) submitted the agreed judgment to each defendant. Mr. Austin admitted that he signed and entered the judgment without personally securing the assent of the individual defendants he was pre-

tending to represent. Transcript, page 23, lines 17 through 22 inclusive. An affidavit was made by County Attorney Smith on July 10, 1976, (and filed with the Clerk shortly after (which refutes the hearsay claim by Austin. Smith stated, in part in said affidavit, that "The remaining defendants [all of them except Fitch, Boyd, and Perez — the latter now a plaintiff], again it must be re-emphasized, did not agree to the Order of June 28, 1976."

Again, the defendants Stacy, Lester, Barnhart, Hoyle, and Sanders have all testified, either in person or by affidavit, that the agreed or consent judgment was not agreed to or consented to by them.

There is no competent evidence to the contrary in the record whatsoever — not a scintilla!

The findings of the three-judge and single judge courts to the effect that "The agreed settlement . . . was entered into by the Defendants voluntarily and not as the result of fraud and compulsion" simply has no basis in the evidence whatsoever as far as the defendants Stacy, Lester, Sanders, Hoyle and Barnhart are concerned. These five defendants have never consented to this judgment at any time — either in spirit or in truth. Appellees would be hard pressed indeed to designate County Commissioners Stacy and Lester as "nominal" parties.

The Appellees want it both ways: As plaintiffs they wanted to subject all of the office holders to the full weight and peril of the judgment; as Appellees they want to pretend that the individual defendants were "nominal" parties whose consent to a judgment subjecting them to the penalties of contempt was not con-

stitutionally necessary.

This is, we respectfully submit, a hateful perversion of constitutional due process. The very fact that the Appellees all make big issue about the individual defendants being nominal parties gives the game away. This is a tell-tale admission that in fact they did not consent to the agreed judgment.

Appellees also try to beg this question by raising the false issue that "only the Commissioners' Court can defend and settle a lawsuit" against the County. True, but the County was only one of ten party defendants in this case. The individual defendants were also named in the consent judgment and the Commissioners' Court had no right to bind any individual to any judgment, as an individual, as a matter of law.

Not only are the questions before this court substantial but this question as to the right of an individual not to have a judgment entered against him without his consent is as fundamental a question of constitutional law as can be imagined in the realm of civil law.

The cause of civil rights is not served by ruthlessly oppressing the alleged oppressors. The judgment and instinct of the three judge court was right the first time in vacating the so-called consent judgment. Its reinstatement was improvident and not supported by the facts.

TRIAL ON THE MERITS?

Appellees incorrectly insist that Appellants were accorded a trial on the merits at the three judge court hearing held in Austin, Texas, on September 2, 1976.

The September hearing concerned only reinstatement of the so-called agreed judgment of June 28 and the transformation of the temporary injunction of April 28 into a permanent injunction. There was no trial on the merits whatever as to the substance of the agreed judgment or as to any other plan of apportionment.

Appellees correctly observe that the three judge court did not have jurisdiction to make a "Section 5 substantive judicial determination" (Motion of Silva, et al., page 5). Such determination should be made in the District of Columbia under the Voting Rights Act. What Appelles overlook, however, is that the plan of apportionment contained in the agreed judgement is a "substantive judicial determination" and is not "confined to a limited inquiry."

That jurisdiction cannot be conferred on a court by the consent or agreement of the parties — if it is otherwise lacking — is fundamental and well settled. 21 C.J.S. 127, "Courts", Sec. 85, "Jurisdiction by Consent." Scores of cases from virtually every jurisdiction in the United States are cited.

We cite here but one of these cases: **Neirbo Company, et al., v. Bethlehem Shipbuilding Corporation, Ltd.**, 308 U.S. 165, 60 S.Ct. 153, 84 L.Ed. 167, 128 A.L.R. 1437.

Mr. Justice Frankfurter tersely states the familiar rule at the beginning of the second paragraph of the court's opinion: "The jurisdiction of the federal courts — their power to adjudicate — is a grant of authority to them by Congress and thus beyond the scope of litigants to confer."

The situation here then is clear. The three judge court did not have the power to adjudicate by a consent decree or agreed judgment what it did not have power to adjudicate in a contested adversary proceeding. On the other hand, if this was simply a choice of venue on which the parties could agree, the three judge court did have jurisdiction to accord Appellants a substantive trial on the merits. In either situation the hearing of September 2 was fatally defective.

Let us not, however, be diverted by this jurisdictional controversy from the real issue here which is one of basic due process. Whether the three judge court had the jurisdiction to enter the "agreed" judgment or not is beside the point when it is considered that as to some (if not all) of the party defendants the judgment binding them was entered without their consent, without their default, and without a trial on the merits anywhere. This is the issue. If a few parties can bind other parties to a judgement without their consent and without a trial, or if an attorney can do so in their behalf but without their authorization, the constitutional provision for due process becomes a mocking thing.

ABUSE OF DISCRETION

At the outset, under this subdivision of the brief, we point out that the findings of both the three judge and single judge court pertaining to the agreed judgment are couched in the most general language conceivable.

The three judge court merely said "2. The Agreed Settlement of May 13, 1976, (1976 Plan) (entered by

the Court nunc pro tunc June 28, 1976) changing the precinct voting boundaries in Frio County, Texas, was entered into by the Defendants voluntarily and not as the result of fraud or compulsion." Jurisdictional Statement, Appendix C, page 8. The single judge finding is exactly the same. Jurisdictional Statement, Appendix B, pages 14-15.

We think it is significant that these orders are not supported by any opinion or memorandum by these courts and that the "findings of fact" in the regard stated are so vague and general and do not take into account the uncontradicted testimony to the effect that at least five of the individual defendants did not agree to the judgment in simple fact.

There was never any allegation or issue of "compulsion." There was never any claim of "fraud," either *eo nomine* or in technical effect, as fraud is properly defined. Misrepresentation as to the law and the facts by the Special Attorney — Yes. Such misrepresentations were compatible with good faith and good intentions (and the contrary was never alleged) but they were nevertheless incorrect and professionally deficient. The counsel has admitted that he was in error on the **Beer** case (sadly in error we might say). See transcript, pages 25-26. It was certainly an important case as to these defendants and the advice they were given with respect thereto was totally wrong.

Appellees want this court to believe that these individual defendants were merely nominal parties but also want it to believe that the Special Attorney was not necessarily misleading them about their supposed inability to re-apportion until 1981 under any circum-

stances unless they swallowed this settlement because they could have been held in contempt if they reapportioned prior to 1981. Parties who are in danger of being held in contempt under a judgement cannot be said to be nominal parties. Also, a reapportionment in the teeth of the settlement plan would have been as contemptible as any future reapportionment.

The plain fact is that on the basis of valid new data, and with a Justice Department clearance or a District of Columbia declaratory judgment, defendants can reapportion at any time.

The cry of Appellees (in which they echo the single judge court) is that defendants merely changed their minds.

The fact is that the County Judge and one of the Commissioners (Boyd) had voted for the settlement against their will but upon good faith belief in bad advice (which itself may have been given in personal good faith but without due professional care).

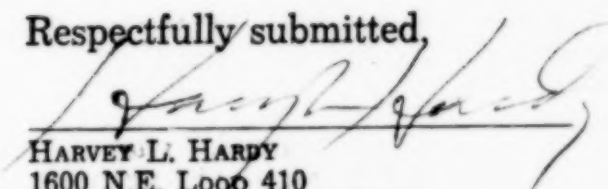
However, as to Stacy, Lester, Sanders, Hoyle and Barnhart, there was no occasion for (or possibility of) a change of mind. None of these defendants ever agreed to the so-called "settlement." This is the key fact in this case.

In the light of this fact we see no reason to prolong this discussion.

Appellees have conceded the jurisdiction of this court. Appellants have demonstrated (unless we are grossly misrepresenting the record) that a particularly flagrant violation of due process has occurred. This

case should be given plenary consideration as a matter of constitutional principle.

Respectfully submitted,


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PROOF OF SERVICE

I certify that on this the 4 day of February, 1977, copies of Appellants' Brief Opposing Appellees' Motions to Affirm were sent to the following attorneys of record for Appellees:

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by deposit in same in the United States Post Office with proper postage affixed thereto.

All parties required to be served have been served.
Dated: February 4, 1977.


HARVEY L. HARDY